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Robert Moser, MD, Secretary

Sam Brownback, Governor

April 17, 2013

EPA Docket Center
ATTN: Docket ID No. EPA-HQ-OAR-2012-0322
EPA West Building
Mail code: 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Sir/Madam:

On behalf of the Kansas Department of Health and Environment (KDHE), thank you for this opportunity to comment on the proposed rule, *State Implementation Plans: Response to Petitions for Rulemakings; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction* (February 22, 2013), 78 Federal Register 12460 ("SSM SIP Proposal").

EPA Provides No Technical Demonstration of "Substantial Inadequacy"

The Kansas regulation subject to this action, K.A.R. 28-19-11, has been in place for almost 40 years and is an EPA-approved SIP provision. For many years, Kansas has implemented, maintained, and enforced the National Ambient Air Quality Standards (NAAQS) in accordance with the federal Clean Air Act (CAA) and each EPA-approved State Implementation Plan (SIP) and SIP revision. EPA has not proven "substantial inadequacy" of the Kansas SIP due to the provisions of K.A.R. 28-19-11 to justify this SIP call under CAA Section 110(k)(5).

Affirmative Defense for Malfunction

KDHE agrees with the EPA's proposal to deny the Petition with respect to affirmative defense provisions in SIPs applicable to sources during malfunctions. Malfunctions are unplanned and unavoidable events that are out of the control of the source owner or operator. Therefore, it makes sense to allow for penalty relief for such events that meet specific criteria and requirements.

We believe that there should be discretion for penalty relief, both monetary and injunctive, for malfunctions meeting specific qualifying criteria and recordkeeping and reporting requirements. The affirmative defense provisions for malfunctions specified by EPA in the proposed action [78 FR 12478-12479] would allow for appropriate enforcement discretion and penalty relief, monetary and injunctive, without risk of negligent recurrence or negative air quality impact.

Affirmative Defense for Startup and Shutdown

KDHE disagrees with EPA's proposal to reverse its longstanding interpretation of the CAA and EPA's policy with respect to affirmative defense provisions for startup and shutdown.

It is widely acknowledged, including by EPA, that most pollution controls are not effectively or efficiently operable upon startup or shutdown. Most control technologies are limited by design based on process flow, temperature, and pressure. The elimination of affirmative defense provisions for startup and shutdown activities ignores reality and its practical limitations.

EPA's 1999 guidance[1], referenced by EPA in multiple SIP approval and promulgation actions over the last three years, allowed States to establish and follow affirmative defense provisions for startup and shutdown activities. Now, EPA is back-pedaling in order to "settle" and satisfy Sierra Club's petition.

In this proposed action, EPA states that they have "previously made the distinction that excess emissions that occur during maintenance should not be accorded special treatment, because sources should be expected to comply with emission limitations during maintenance activities as they are planned and within the control of the source. The EPA believes that same rationale applies to periods of startup and shutdown." [78 FR 12471] With this statement, EPA cited their 2010 Texas SIP rulemaking and the 2012 court decision on that action.[2] However, EPA did not espouse that "same rationale" for startup and shutdown during their 2010 Texas SIP rulemaking or during the litigation of that rulemaking. EPA's policy reversal on startup and shutdown affirmative defense is actually much more recent.

In the EPA action on the Texas SIP and in the ensuing litigation, EPA indicated that they likely would have approved the affirmative defense provisions for planned startup and shutdown events if there had not been the inclusion of planned maintenance activities and if the State had not improperly cross-referenced provisions for unplanned events in their rule for planned events.

> May 13, 2010 Proposed Rule[3]: "The EPA's interpretation of section 110 of the Act and related policies allows an affirmative defense to be asserted against civil penalties in an enforcement action for excess emissions activities which are sudden, unavoidable or caused by circumstances beyond the control of the owner or operator and where emissions control systems may not be consistently effective, such as during startup and shutdown periods."
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> November 10, 2010 Final Rule[4]: "...we interpret the CAA to allow EPA to approve a SIP revision submittal from a State that provides an affirmative defense for excess emissions during planned startup

[1] "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," ("1999 SSM Guidance"), Steven A. Herman and Robert Perciasepe, September 20, 1999.

[2] The EPA cites their "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 at 68992 (November 10, 2010) and the related court decision, *Luminant Generation Co. v. EPA,* 699 F.3d 427 (5th Cir. 2012).

[3] See, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 26892 at 26896 (May 13, 2010).

[4] See, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 at 68997 (November 10, 2010)

> or shutdown activities, but the inclusion of planned maintenance activities and the failure to include appropriate criteria (due to improper cross-referencing) for planned startup and shutdown activities renders the submitted section 101.222(h) unapprovable."

KDHE agrees with EPA's 2010 interpretation as expressed in the excerpts above.

The Kansas air quality program successfully implemented, and continues to implement, maintain, and enforce, provisions for the protection of the NAAQS, PSD increments, and visibility. KDHE recommends that EPA reconsider the elimination of affirmative defense provisions for startup and shutdown activities and the reversal of 40 years of regulatory precedent.

Authority and Discretion

The Clean Air Act (CAA) directs EPA to set air quality standards for pollutants. However, the CAA renders the responsibility and authority to the States to develop plans for implementation, maintenance, and enforcement by whatever means the States choose to attain those standards.

We believe that EPA's approach in this proposed rulemaking is contrary to the federal-state partnership intended in the CAA.

Stakeholder Input and Timing

We are disappointed in how EPA has opted to handle this process, which affects the majority of States and poses significantly broad consequence for the States and for their regulated communities.

EPA has had years to contemplate, evaluate, and work with the Sierra Club to compromise and resolve issues in the Sierra Club's petition. During this time, no outreach by EPA to the States or to regulated entities occurred. EPA has only hinted at possible future actions on SSM provisions without any indication of whether or not they would make changes, which specific provisions they considered to be problematic, how they might work towards resolution, or how the States could collaborate with EPA in evaluating and resolving potential issues with any State regulations and plans.

In the proposed action, EPA states that "given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time for these corrections to occur will ultimately be the best course to ensure the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements." [78 FR 12468] KDHE agrees with and encourages a "careful and comprehensive" process in EPA's efforts to modify the longstanding SIP provisions in question. We believe such a process must involve input from all affected parties, which include States and regulated entities, and should not be based solely on argument and compromise between the plaintiff and defendant parties in litigation (i.e., "sue and settle").

A "careful and comprehensive process" will ensure more complete success the first time around.

KDHE strongly encourages the EPA to delay final rulemaking and to take the time to engage the States and regulated entities in a collaborative effort to improve upon the framework of each State's plan for the continued implementation, maintenance, and enforcement of the air quality standards.

Thank you for this opportunity to provide comments on the proposed rulemaking action. Please do not hesitate to contact Rick Brunetti, Director, Bureau of Air at 785-296-1551 or me, if you have questions.

Sincerely,

John W. Mitchell, Director
Division of Environment

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